

# BETWEEN THE TIERS: THE NEW[EST] EQUAL PROTECTION AND *BUSH v. GORE*<sup>1</sup>

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## INTRODUCTION

This Essay (in Sections I and II) briefly traces the evolution of modern equal protection doctrine in order to point (in Section III) to a disparate but substantial group of equal protection decisions that do not fit, and that the Court did not pretend to fit, into one of the officially identified three tiers of Equal Protection Clause analysis. The Essay (in Section IV) defends the viewpoints, attributed to Justices Marshall and Stevens, that (1) proper equal protection scrutiny demands differing levels of justification for state policies, depending on the nature of the group lines drawn by the state classification and the nature of the benefit that the classification has burdened; and (2) Supreme Court opinions applying the Equal Protection Clause would be improved if Justices honored an obligation in each instance to indicate in some detail how they assess each of these for the case at hand, rather than resting upon the talismanic invocation of labels like "suspect classification," "fundamental right," and so forth. As part of the argument that such a doctrinal reform would have salutary consequences, the Essay (in Section V) then points out ways in which such doctrinal obligations, were they to be imposed, might have altered the per curiam opinion in *Bush v. Gore*.

## I. BIRTH AND MATURATION OF THE NEW EQUAL PROTECTION

Three score and three years ago, in the *Carolene Products* footnote,<sup>2</sup> modern equal protection doctrine was conceived.<sup>3</sup> Its two-stage birth

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<sup>1</sup> 531 U.S. 98 (2000).

<sup>2</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). The footnote reads:

occurred during the 1940s: the fundamental rights piece of the doctrine in *Skinner v. Oklahoma*,<sup>4</sup> and the suspect classification segment of it in *Korematsu v. United States*.<sup>5</sup> *Skinner* established that the Equal Protection Clause mandates that a state classification depriving a particular group of “*fundamental*,” “*basic civil rights*” must be subjected to “*strict scrutiny*.”<sup>6</sup> *Korematsu* (although it notoriously upheld the law in question) declared that “all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect* . . . . [C]ourts must subject them to the *most rigid scrutiny*. [They may be upheld only when justified by] [*p*]ressing *public necessity* [on the magnitude of] the gravest imminent danger to the public safety.”<sup>7</sup>

These non-identical twin prongs of fundamental rights strict scrutiny and suspect classification strict scrutiny reached maturity in the mid-1960s, when the Warren Court relied on them to strike down a wide array of statutory classifications that limited the rights of one or another group. In 1964, and again in 1967, the Court finally de-

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There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

<sup>4</sup> It occurred, to be sure, within a discussion of a Due Process Clause challenge, but the Court spoke nonetheless in the broader terminology of applying “the general prohibitions of the Fourteenth Amendment.” *Carolene Products Co.*, 304 U.S. at 152 n.4.

<sup>5</sup> 316 U.S. 535 (1942). To be sure, *Skinner* did not fit comfortably into the strict scrutiny categories set forth in the *Carolene* footnote, but Justice Douglas tried valiantly to squeeze it into them. First, he argued that the procreation right of which the petitioner was to be deprived was “one of the basic civil rights of man,” “fundamental,” and “a basic liberty.” *Id.* at 541. This language appeared to liken procreation to the First Amendment rights (within the first of the *Carolene* categories warranting “more exacting judicial scrutiny,” 304 U.S. at 152 n.4), in that the Court had recently noted in cases like *Lovell v. Griffin* that, “[f]reedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the *fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action*.” 303 U.S. 444, 450 (1938) (emphasis added). Second, he insisted repeatedly on the linkage between protecting the fundamental right of procreation and the need to protect the survival of unpopular racial groups: The procreation right “is basic to the perpetuation of a race . . . . [It is] fundamental to the very existence and survival of the race. [When a state sterilizes one group of criminals but not another who committed a crime of equal turpitude, it makes] as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” *Skinner*, 316 U.S. at 536, 541.

<sup>6</sup> 323 U.S. 214 (1944).

<sup>7</sup> 316 U.S. at 541 (emphasis added).

<sup>8</sup> 323 U.S. at 216, 218 (emphasis added).

ployed the strict scrutiny/suspect classification language to declare unconstitutional some racially discriminatory statutes. These laws criminalized, respectively, the "occupy[ing] in the nighttime [of] the same room" by a "negro man and white woman or any white man and negro woman,"<sup>8</sup> and any marriage between a white and a non-white (other than a descendant of Pocahontas!).<sup>9</sup> In *McLaughlin v. Florida*, the Court explained that under strict scrutiny any "constitutionally suspect" classification could be upheld only if clearly shown to serve "some overriding statutory purpose"<sup>10</sup> and if demonstrated to be "necessary, and not merely rationally related, to the [purpose]."<sup>11</sup> *Loving v. Virginia* then reiterated *McLaughlin's* suspect classification/strict scrutiny language to reach similar results.<sup>12</sup>

In 1964, the Court used fundamental rights/strict scrutiny language to apply the Equal Protection Clause for the first time since *Skinner*, to strike down malapportioned legislative district lines on the grounds that the right to vote is a "fundamental political right" and therefore "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."<sup>13</sup> In 1966 the Court repeated this rule to declare that conditioning the right to vote on payment of a (maximum) \$1.50 annual tax amounted to invidious discrimination.<sup>14</sup>

<sup>8</sup> *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (quoting FLA. STAT. ANN. § 798.05 (repealed 1964)).

<sup>9</sup> *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967).

<sup>10</sup> 379 U.S. at 192 (emphasis added).

<sup>11</sup> *Id.* at 196 (emphasis added).

<sup>12</sup> *Loving*, 388 U.S. at 11.

<sup>13</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citations omitted). Many scholars and casebooks perceive *Griffin v. Illinois*, 351 U.S. 12 (1956) (ruling that a state must supply a free trial transcript to an indigent convict desiring to appeal his conviction where the appeal generally is allowed and a transcript is required) and *Douglas v. California*, 372 U.S. 353 (1963) (ruling that the State must supply free counsel to an indigent desiring to exercise a statutory right to appeal) as precursors in this line of fundamental rights equal protection cases. While the Equal Protection Clause is prominently mentioned in *Griffin* and its progeny, I consider these cases to be best understood as fundamental fairness procedural due process cases.

<sup>14</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). In *Harper* and a number of other cases (e.g., *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969)) leading up to *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court majority spoke of poverty also as a "disfavored," "invidious," or "suspect" classification. See *Harper*, 383 U.S. at *passim*. Later cases have stayed away from this rhetoric, although sometimes the Court does rule that fees must be waived for the indigent when fundamental rights are at stake. E.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (ruling fundamental the right of access to courts to appeal a termination of parental rights, on the grounds that when penalties as severe as termination of parenthood are threatened, the procedure is properly viewed as "quasi-criminal" and due process demands that access to judicial process may not turn on ability to pay); *Lindsey v. Normet*, 405 U.S. 56 (1972) (finding a tenant's claim to his house to be a fundamental right and noting the unique harm to indigents in ruling arbitrary a bond requirement of double the accrued rent pending an appeal of eviction, because of its dissimilarity to bonds in comparable civil actions); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (ruling that because of the basic importance of marriage in society and the unique role of the state in divorce, indigents have a fundamental right of access to courts to obtain a divorce).

In 1965 in *Griswold v. Connecticut*,<sup>15</sup> the Court declared that there is a right of marital privacy that includes the freedom to use contraceptives and that it is a fundamental right. Several Justices in the majority borrowed language that had been deployed in First Amendment cases to complete the paradigm (only sketched in *Skinner*) for applying fundamental rights strict scrutiny.<sup>16</sup> The paradigm was to include the test of necessity for a compelling interest. Writing for a five Justice majority, Douglas found regulations that restrict constitutionally "protected freedoms" may not "sweep unnecessarily broadly."<sup>17</sup> Government, absent a showing of a compelling, subordinating state interest could not "take away the right to procreate" added Goldberg for three of the Justices from the majority.<sup>18</sup> Statutes regulating protected liberties "must be viewed in the light of less drastic means for achieving the same basic purpose"<sup>19</sup> and "the State may prevail only upon showing a subordinating interest which is compelling," concurred Justice White, writing separately.<sup>20</sup>

A four Justice plurality of the Court declared in 1972 that if (as seemed apparent to the Court) the ban on contraceptive distribution to unmarried people was meant to express the state's moral condemnation of contraceptive use per se (as presumably limited by *Griswold* such that married couples had to be exempted), such a ban was nonetheless invidious discrimination under the Equal Protection Clause because "if the right of privacy means anything, it is the right of the individual, married or single, to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>21</sup> Having declared that this fundamental right accrued to single persons, the Court then concluded that the state did not have adequately "warranted" justification for the statutory line permitting married but not unmarried persons to receive contraceptives to exercise this right.

By 1968,<sup>22</sup> the Court had explicitly applied the approach delineated in *Griswold* for due process, fundamental rights analysis (and in

<sup>15</sup> 381 U.S. 479 (1965).

<sup>16</sup> The *Griswold* context was the Fourteenth Amendment Due Process Clause, but the paradigm then quickly carried over to the equal protection fundamental rights cases.

<sup>17</sup> 381 U.S. at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

<sup>18</sup> *Id.* at 496 (Goldberg, J., concurring). See also *id.* at 497 ("[W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.").

<sup>19</sup> *Id.* at 503-04 (White, J., concurring) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

<sup>20</sup> *Id.* (White, J., concurring) (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

<sup>21</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added) (emphasis removed from "individual") (citations omitted). While the decision was 6-1 as to the holding of unconstitutionality, the division was 4-3 on behalf of this rule of law. Justices Blackmun and White would have struck down the law simply on the grounds that it unnecessarily burdened the right of marital privacy.

<sup>22</sup> *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down under the Equal Protection Clause excessively burdensome ballot access requirements for minor parties).

numerous First Amendment and Fourteenth Amendment due process cases) to decide an equal protection case concerning the fundamental right to cast an effective vote. Instead of the vague "carefully scrutinize" language of *Reynolds* and *Harper*, the Court in *Williams v. Rhodes* flatly stated the need for the state to meet the "compelling interest" test when such rights were burdened.<sup>23</sup>

In 1969,<sup>24</sup> the Supreme Court again explicitly applied this compelling interest test for equal protection fundamental rights scrutiny. The Court noted that the right to travel freely from one state to another was implicitly protected by a number of constitutional provisions—including Article IV, Section 2, the Commerce Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment—and that therefore any classification burdening it "unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."<sup>25</sup> Applying this test, the Court declared unconstitutional a state rule forbidding newcomers to the state from receiving welfare benefits until they had resided there for one year.

In the same year, the Court used the same necessity/compelling interest test to declare void a law prohibiting residents who were not property owners or parents of schoolchildren from voting in school district elections.<sup>26</sup>

## II. THE NEWER EQUAL PROTECTION

By the time of *Eisenstadt*<sup>27</sup> in 1972, the modern, two-tiered equal protection doctrine had fully matured. It was now "the new equal protection," which supplemented the old minimal scrutiny tier with a new, full-blown strict scrutiny tier that was to be applied in either of two specified situations: (1) to examine the constitutionality of laws imposing suspect classifications;<sup>28</sup> and (2) to test the constitutionality of statutes restricting or burdening judicially identified fundamental rights (those rights mentioned in the Bill of Rights as well as the rights to vote, interstate travel, and procreative privacy).<sup>29</sup>

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<sup>23</sup> *Id.* at 31 (noting that a First Amendment right, freedom of political association, and the right to cast an effective vote were burdened, but invoking the "compelling interest" test as appropriate for each).

<sup>24</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>25</sup> 394 U.S. at 634.

<sup>26</sup> See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

<sup>27</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>28</sup> In 1971, in *Graham v. Richardson*, 403 U.S. 365, the Court added alienage to nationality and race as a basis of classification to be presumed invidious and therefore "suspect," triggering strict scrutiny under the Equal Protection Clause. Although alienage discrimination is not as uniformly declared invalid as racial discrimination, the line of progeny from *Graham* has proved sturdy. Race had been presumed invidious since the beginning of Fourteenth Amendment litigation. See *Strauder v. West Virginia*, 100 U.S. 303 (1880); *The Slaughterhouse Cases*, 83 U.S. 36 (1873). Nationality followed shortly thereafter. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>29</sup> It is worth noting that the *Carolene Products* footnote did two things. First, it set forth the

Exactly at this point, Gerald Gunther published his classic *Harvard Law Review* article on the "newer" equal protection.<sup>30</sup> No sooner than the Supreme Court had created the new equal protection, it produced in the late 1960s and early 1970s a group of equal protection cases that fit *neither* the old (minimal scrutiny, or lower tier) nor the new (fundamental rights/suspect classification, or upper tier) equal protection framework.

In these cases, the "newer" group, the Court was purporting to apply the old equal protection scrutiny—i.e., the minimal rationality test—but was producing rulings that indicated some sort of heightened scrutiny was in fact being applied. By 1972, this group of between-the-tiers cases included two cases concerning rights of persons born out-of-wedlock ("illegitimates" in judicial terminology),<sup>31</sup> two cases concerning sex discrimination,<sup>32</sup> and a few other cases that fit no easy categorization.<sup>33</sup>

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doctrine that there could properly be under the Fourteenth Amendment what has come to be called a two-tier approach: minimal scrutiny for most legislative classifications or restrictions on liberty, and a stricter scrutiny for restrictions on more fundamental liberties and more invidious classifications. In this sense the footnote contained the germ of these modern equal protection developments. Second, it attempted to cabin the judicial discretion or judicial power implied in allowing a variety of ways to apply the Fourteenth Amendment, by restricting strict scrutiny to what John Hart Ely has called "representation reinforcing" concerns—concerns that are linked to the Fourteenth Amendment text in that they describe the political "process" that is "due" to Americans. In this second effort the footnote had failed within four years, as exemplified in the *Skinner* case. Just as Justice Douglas tried there to squeeze his fundamental rights analysis into the suspect classification box where it clearly did not fit, *see supra* note 4, he tried again in *Griswold* to squeeze the right of marital procreational "privacy" into the implications of the First, Third, Fourth, Fifth, and Ninth Amendments, evidently attempting to find shelter under the *Carolene* category "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Carolene Products*, 304 U.S. at 152, n.4.

<sup>30</sup> Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>31</sup> *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

<sup>32</sup> *Reed v. Reed*, 404 U.S. 71 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>33</sup> *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (ruling unconstitutional on equal protection grounds a state law that recouped costs of appeal transcripts from the prison wages of incarcerated indigents but demanded no reimbursement from indigent appellants not in prison, over the dissent [Harlan] that found the administrative convenience was rational grounds for the distinction); *Jackson v. Indiana*, 406 U.S. 715 (1972) (ruling unconstitutional on equal protection grounds a more lenient commitment standard for those mental incompetents who are charged with a crime but are unable to stand trial); *James v. Strange*, 407 U.S. 128 (1972) (ruling unconstitutional on equal protection grounds a state law denying a variety of exemptions to indigent defendants suing for reimbursement of defense fees by the state where the exemptions were allowed to other debtors in civil judgments).

Gunther could have cited two additional cases: *Baxstrom v. Herold*, 383 U.S. 107 (1966) (ruling it a violation of equal protection to civilly commit a prisoner at the end of his sentence without a jury trial for the civil commitment, where such a jury trial was available to any non-prisoner) and *Lindsey v. Normet*, 405 U.S. 56 (1972) (finding a violation of equal protection for a state to require that in order to appeal a summary eviction process for non-payment of rent, the appellant post a bond equal to twice the amount of the rent that would accrue pending the decision, which was twice what was required of appellants of other civil actions).

Noticing this development, Gunther—in what has become one of the most cited law review articles ever<sup>34</sup>—suggested that the Justices would be well advised to develop a “modestly interventionist model” of equal protection jurisprudence<sup>35</sup>—one that would look for a substantially reasonable fit between legislative classification and stated legislative purpose, and would do so for all equal protection challenges rather than just those singled out by the Justices for special treatment.

Instead, in the very next term the Supreme Court majority in *San Antonio Independent School District v. Rodriguez*<sup>36</sup> went to elaborate lengths to attempt to cabin what was starting to look like explosive growth in equal protection jurisprudence. Justice Powell wrote an opinion emphatically finding only two available levels of scrutiny: if the equal protection challenge concerned either a suspect classification or a fundamental rights restriction, then strict scrutiny was in order; otherwise, minimal rationality was all that the Court would require. In *Rodriguez*, however—where the litigants wanted the property tax-based system of extremely unequal school funding declared invalid because they viewed education as a fundamental right and poverty as a suspect classification—Powell insisted to the contrary that the only constitutionally protected fundamental rights were those the constitutional text identified either explicitly or implicitly and that the purported right to an education did not fit this description.<sup>37</sup> Earlier Court statements referring to poverty as “suspect,” he insisted, had all involved deprivations of a right identified either explicitly or implicitly in the constitutional text, and therefore poverty could not trigger strict scrutiny in a case of this sort (since no such right was involved).<sup>38</sup>

Justice Marshall, with Justice Douglas in concurrence, dissented, arguing somewhat along the lines of the Gunther essay, that a “newer equal protection” was not only appropriate and fair, but also described what the Court in fact had been doing.<sup>39</sup> This “newer” equal protection had examined, and should continue to examine, under

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<sup>34</sup> Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985). As of 1985, it was not only the most cited law review article but also was well in the lead for articles published after 1979. Shapiro has since revised this list and now lists Gunther as the third most cited article, as of 1996. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT. L. REV. 751, 767 (1996).

<sup>35</sup> Gunther, *supra* note 30, at 43.

<sup>36</sup> 411 U.S. 1 (1973).

<sup>37</sup> It is striking that no one accused Justice Powell of whistling in the dark, since the Court had just handed down *Roe v. Wade*, 410 U.S. 113 (1973), protecting the most controversial unenumerated right of modern jurisprudence (although Justice Marshall's dissent did bring up the unenumerated rights protected in *Eisenstadt* and *Rodriguez*, 411 U.S. at 100, 103-04 (Marshall, J., dissenting)).

<sup>38</sup> *Rodriguez*, 411 U.S. at 29-35.

<sup>39</sup> *Id.* at 110 (Marshall, J., dissenting). Justice Marshall, in fact, cited Gunther in his dissent. See *id.* at 110 n.67.

equal protection challenges, both the "invidiousness of the basis upon which the particular classification is drawn" and "the constitutional and societal importance of the interest adversely affected" by it.<sup>40</sup> Depending on these factors, the Court appropriately varied the degree of justification that it required from the state. The more likely the classification was to reflect sheer prejudice, and the more important the interest was in relation to constitutional values, the greater the burden of justification that should be put on the state.

Justice White wrote his own dissent, joined by Justices Douglas and Brennan, in which he argued that the property tax-based school funding scheme in question did not even meet the "rationality" test.<sup>41</sup> Clearly, Justice White was using a stiffened version of what he called the "rationality" test, a version that Gunther had termed "rationality with bite."<sup>42</sup> In other words, White's approach to the Powell-Marshall standoff in *Rodriguez* was to remain silent about it but to follow the advice of Justice Marshall, except that Justice White *called* the fluctuating degree of scrutiny the old rationality approach.

The Court's way of handling challenges to discrimination with respect to gender and to out-of-wedlock births continued to stray outside the lines of the tidy framework constructed by Justice Powell, and by 1976 the Court admitted that in fact there were three tiers of equal protection scrutiny. The middle "intermediate" tier applied to gender discrimination and to discrimination against persons born out-of-wedlock.<sup>43</sup> It required that classifications based on gender or on out-of-wedlock birth in order to satisfy equal protection would have to be shown to be "substantially related" to an important government interest.<sup>44</sup>

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<sup>40</sup> *Id.* at 99 (Marshall, J., dissenting).

<sup>41</sup> *Id.* at 67-70 (Douglas, Brennan & White, JJ., dissenting).

<sup>42</sup> Gunther, *supra* note 30, at 18-22.

<sup>43</sup> For gender, see *Craig v. Boren*, 429 U.S. 190 (1976), and its progeny. For a discussion of this line of cases see LESLIE FRIEDMAN GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN: CASES IN LAW AND SOCIAL CHANGE* (2d ed. 1988). For illegitimacy, the Court did not formally announce that it was using the *Craig* test until 1988 in *Clark v. Jeter*, 486 U.S. 456 (1988) (striking down a six-year statute of limitations for bringing paternity actions on behalf of non-marital children). The Court appeared, however, to follow the *Craig* approach beginning with cases in 1977. See *Pickett v. Brown*, 462 U.S. 1 (1983) (striking down a two-year deadline for paternity and child support actions for non-marital children); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (striking down a law setting one-year time deadlines for a suit for child support for non-marital children); *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding a law banning intestate inheritance by non-marital children unless there was a judicial finding of paternity during the father's lifetime, on the grounds that there was a substantial relation between the law and important state interests); *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down a ban on intestate inheritance from their fathers by non-marital children).

<sup>44</sup> *Craig*, 429 U.S. at 197.



### III. NEWEST EQUAL PROTECTION

This official Court embrace of a newer (albeit not Gunther's newer) equal protection standard did not manage to solve the problem of providing predictable guidelines for all of the Court's equal protection challenges. The Court continued from time to time to hand down decisions that did not fit the criteria for elevation to either the strict or intermediate tier and yet that offended the Court's sense of fairness to the point that the Court declared them violations of equal protection, even though legislatures virtually never adopt laws for literally no reason. Due to the continuing occurrence of such "outlier" cases<sup>45</sup>—by which I mean equal protection decisions for which the Court has yet to account by a coherent theory—one encounters periodically law review articles, in the mode of Gunther's (or of Professor Baker's remarks at this Symposium),<sup>46</sup> still calling for or heralding a new (or NEW newer, if three-tier scrutiny should be thought of as the simply "newer") equal protection scrutiny.<sup>47</sup>

When the Court established the intermediate scrutiny standard in *Craig*, Justice Stevens (just one year after joining the Court) concurred separately to explain that in his honest judgment there was, properly speaking, neither a dual nor a tri-part but only a single standard for equal protection review: the clause requires impartial treatment by every state.<sup>48</sup> Stevens urged that the Court, rather than describe itself as being guided by one of three fixed standards, move toward specifying in each equal protection case the considerations motivating the particular decision as to whether impartiality had been violated.<sup>49</sup> In effect, Stevens was endorsing something close to the

<sup>45</sup> The term "outlier" is from Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209 (1999).

<sup>46</sup> See Professor Edwin Baker, Introductory Address at the University of Pennsylvania Journal of Constitutional Law Symposium: Equal Protection After the Rational Basis Era (Feb. 2-3, 2001) (videotape on file with the *University of Pennsylvania Journal of Constitutional Law*).

<sup>47</sup> Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, in *with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277 (1997); Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. J. 381 (1994); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999); R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493 (1992); R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1 (1995); Nice, *supra* note 45; Brenda Swierenga, Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454 (1986); John D. Wilson, Comment, *Cleburne: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163 (1986).

<sup>48</sup> *Craig*, 429 U.S. at 211-13 (Stevens, J., concurring).

<sup>49</sup> *Id.* at 212 (Stevens, J., concurring) (stating that he believed that "the two-tiered analysis of equal protection claims . . . is a method . . . to explain decisions that actually apply a single standard" and that standard may be identified more easily through a "careful explanation of the reasons motivating particular decisions").

variable approach defended by Marshall in the *Rodriguez* case,<sup>50</sup> for Stevens spoke of analyzing the degree of offensiveness of the classification, the likelihood that it reflected unthinking (prejudiced) discrimination, the gravity of the burden it placed on those who were disfavored by it, and the strength of the likely benefit to the public from the discrimination in question.<sup>51</sup> This still left only two Justices in favor of some version of the Marshall position, for Justice Stevens had replaced Douglas, who had been the sole other Justice to align himself with Marshall's earlier opinion.<sup>52</sup>

Also, as had happened in *Rodriguez*, at least Justice Stewart in *Craig* insisted that the statute in question represented "total irrationality" rather than accept the idea of openly espousing flexible standards of scrutiny,<sup>53</sup> even though some of his own colleagues on the Court (Burger and Rehnquist) insisted that the statute was in fact rationally related to legitimate state interests.<sup>54</sup> In other words, certain Justices evidently believe it is better to apply a somewhat heightened version of the rationality test—certainly one stiffer than the most minimal versions the Court sometimes describes<sup>55</sup>—than it is to admit to the public that the degree of justification demanded from the state to satisfy "equal protection" varies depending on: (1) the nature of the group line that the state is drawing and (2) on the constitutional value of the interest that the state is burdening or withdrawing by its classification. Moreover, the variation in degree of justification has two dimensions: the importance of the benefit the state claims it derives from the classification, and the strength of the logical and empirical connection between the classification and the goal that the state is pursuing. Justice Stevens's lone call in *Craig* for the kind of detailed elaboration of the multiplicity of considerations that shape equal protection scrutiny succeeded no better than Justice Marshall's

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<sup>50</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-137 (1973) (Marshall, J., dissenting) (disagreeing with the majority's holding that the State did not discriminate in the provision of public educational opportunities to children in poorer school districts).

<sup>51</sup> See *Craig*, 429 U.S. at 213-14 (Stevens, J., concurring) (discussing possible motivations behind the challenged law).

<sup>52</sup> Compare *Rodriguez*, 411 U.S. at 70-137 (Marshall, J., dissenting), with *Craig*, 429 U.S. 211-14 (Stevens, J., concurring) (using an analysis similar to that employed in Justice Marshall's *Rodriguez* dissent, which was joined by Justice Douglas).

<sup>53</sup> See *Craig*, 429 U.S. at 215 (Stewart, J., concurring) (stating that "[t]he disparity created by these Oklahoma statutes amounts to total irrationality" because the State "fail[s] to prove . . . that 3.2% beer is somehow more deleterious when it comes into the hands of a male aged 18-20 than of a female of like age").

<sup>54</sup> See *id.* at 217 (Burger, C.J., dissenting).

<sup>55</sup> In *Heller v. Doe*, 509 U.S. 312 (1993), for instance, the Court said that ordinary equal protection scrutiny accords laws "a strong presumption of validity" and upholds the law "if there is a rational relationship" with "some legitimate governmental purpose," whether or not the legislature ever articulated the purpose, and that the law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 319-20 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

earlier attempt to attract a majority to the open announcement that equal protection analysis operated on a kind of sliding scale.

What appears to prevail most of the time instead is a sub silentio embrace of the sliding scale approach. Generally, the Court has no reason to mention it, because most equal protection challenges where the Court wishes to strike down the classification can be fit into one of the stricter scrutiny tiers. Alternatively, where the Court finds the classification inoffensive, the rationality test applies well. Occasionally, however, a majority of the Justices believes a measure adopted by state officials, a state legislature, or even a referendum electorate—comprised for the most part of rational human beings pursuing their honest conception of the public interest—nonetheless violates the principle that Stevens called “impartiality,” and yet does not fit one of the stricter scrutiny categories.<sup>56</sup> On these occasions, the majority strikes down the statute in one of two ways: Either the Justices claim (unpersuasively in my mind, for the reason just stated) that the statute lacks a rational relation to a legitimate aspect of the public interest, or they more frankly acknowledge that they are demanding a more substantial justification from the state (but not one identical to the test of necessity-for-a-compelling-interest), a justification that the state failed to provide.<sup>57</sup> Even when the Court takes the latter approach, because it does not openly embrace the logic defended either by Justice Marshall or by Justice Stevens, the Court still confuses commentators and the public.<sup>58</sup> Moreover, the Court’s reticence about the nature of its constitutional analysis does not seem to produce any compensatory benefit for the confusion caused, such as according more respect to the legislative judgment behind laws that do not fit either of the two elevated scrutiny categories. A table of at least eleven such cases that the Court has produced since *Rodriguez* follows below:<sup>59</sup>

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<sup>56</sup> See *infra* table for list of examples.

<sup>57</sup> Cases that seem to fit this latter mold in the post-*Rodriguez* period would include two that engage in what might be called quasi-fundamental rights analysis, and three that might be characterized as containing quasi-suspect classification analysis. The former two are *Plyler v. Doe*, 457 U.S. 202 (1982) (actually, this one fits both categories, since the classification too was problematic), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); the latter three are *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). For further details, see *infra* table.

<sup>58</sup> See Farrell, *supra* note 47. After a careful, thoughtful, and unusually honest examination of ten of the cases after *Rodriguez* where the Court did not claim to be applying either of the two upper tiers of scrutiny but nonetheless rejected rational arguments for the law and judged it a violation of the Equal Protection Clause, Farrell, for instance, concludes: “Is it too much to ask that the Court decide cases consistently and predictably? Apparently the answer to this question is yes . . . . The Court continues to write opinions as if they matter, but the Court’s jurisprudence of heightened rationality is difficult to understand.” *Id.* at 415.

<sup>59</sup> Ten of these cases were singled out in Farrell, *supra* note 47. I have added *M.L.B. v. S.L.J.* to his compilation. 519 U.S. 102 (1996).

## TABLE

Between-the-Tiers Equal Protection Cases  
After *San Antonio v. Rodriguez*

<u>CASE</u>	<u>MAJORITY &amp; AUTHOR</u>	<u>RATIONALE</u>
<i>United States Dep't of Agric. v. Moreno</i> 413 U.S. 528 (1973) (ruling unconstitutional a denial of food stamps to individuals who live in households of unrelated individuals).	7-2 Brennan	Interests suggested by government lacked [adequately] rational tie to the classification; apparent legislative purpose to exclude politically unpopular group (hippies); statute "wholly without rational basis."
<i>Zobel v. Williams</i> 457 U.S. 55 (1982) (ruling unconstitutional a 1980 statute distributing monetary benefits to adult residents in proportion to length of residence in the state since 1959).	8-1 Burger	State goal of rewarding residents for length of residence as proxy for past service to state not legitimate; other asserted goals not plausibly tied to statute.
<i>Plyler v. Doe</i> 457 U.S. 202 (1982) (ruling unconstitutional a law denying free public schooling to children of illegal aliens).	5-4 Brennan	Education is not a "fundamental right" and illegal alienage is not a "suspect classification." Education is important for our society and it is unfair to punish children for parents' choices. State goal furthered would have to be "substantial." State failed to convince Court with "credible evidence" that its substantial goals were furthered by this law.
<i>Metro. Life Ins. Co. v. Ward</i> 470 U.S. 869 (1985) (ruling unconstitutional a state tax rate differential on premiums favoring in-state insurance companies over out-of-state ones).	5-4 Powell	Purpose of the law—"to promote domestic industry"—is a forbidden purpose.
<i>Williams v. Vermont</i> 472 U.S. 14 (1985) (ruling unconstitutional a state "use" tax imposed on registrants of cars purchased out-of-state by non-residents at time of purchase).	5-3 White	Discrimination against former non-residents who had purchased out-of-state as compared to a resident who did so lacked a rational relation to the purpose of having those who use roads pay for them.
<i>Hooper v. Bernalillo County Assessor</i> 472 U.S. 612 (1985) (ruling unconstitutional a 1981 state law giving property tax exemption to Vietnam veterans who had resided in state prior to 1976).	5-3 Burger	Discrimination among veterans between long-standing and more-recent residents of state to favor the former is not rationally related to state goal of rewarding veterans, and the goal of rewarding only long-term residents for being veterans is impermissible.

*City of Cleburne v. Cleburne Living Ctr., Inc.* 9-0 White

473 U.S. 432 (1985)

(ruling unconstitutional, as applied, a zoning ordinance that required a special use permit for homes for the "insane, feeble-minded, alcoholics, or drug addicts," where such permit was denied to a home for the mentally retarded).

Despite unanimity on holding, five Justices offered rationales different from that of White's "opinion of the Court," that this application of the law bore so little relation to the asserted legislative goals that it was "apparently reflecting sheer animus." Two of the five defended Stevens' fluid rationality approach, which varies the requirement for degree of justification based on degree of likely invidiousness of classification and substantiality of the benefit being restricted. Three defended Marshall's approach that would explicitly tighten the degree of scrutiny (i.e., not call it "rational" scrutiny) in proportion to the degree of likely invidiousness of the classification and to the "constitutional and social importance of the interest adversely affected."

*Allegheny Pittsburg Coal Co. v. County Comm'n* 9-0

Rehnquist

488 U.S. 336 (1989)

(ruling unconstitutional county tax assessment scheme based solely on most recent purchase price where state law required assessment based on "estimated market value").

Court rejected county rationale that the savings accrued from not frequently estimating market value compensated for tax revenue lost by failure to frequently update assessments. Court also judged the tax preference for long-held properties arbitrary in light of state law.

*Quinn v. Millsap*

491 U.S. 95 (1989)

(ruling unconstitutional state constitutional provision restricting membership on appointed city-county reorganization board to real property owners).

9-0  
Blackmun

Link between property ownership and knowledgeability desired for membership on this board so attenuated that the classification fails the rationality test.

*Romer v. Evans*

517 U.S. 620 (1996)

(ruling unconstitutional state constitutional amendment forbidding any law, action or policy by the state, its agents, or its subdivisions to entitle persons of homosexual orientation to claim (unlawful) discrimination).

6-3 Kennedy

Sweeping breadth of the deprivation of benefits is so discontinuous with state's asserted purposes that the classification must be judged the result of "sheer animus" and therefore lacking "a rational relation to legitimate state interests."

*M.L.B. v. S.L.J.*

519 U.S. 102 (1996)

(ruling unconstitutional state requirement that an indigent wishing to appeal a termination-of-parental-rights order must pay in advance the cost of preparing transcript of the trial (here more than \$2,000)).

6-3  
(on equal protection with one concurrence on due process grounds)  
Ginsburg

"Fundamental" and decision to terminate is "quasi-criminal" proceeding, so the importance of the asserted government interest must be examined "closely and contextually" in avoiding termination of parental rights. State goal of saving money is insufficiently substantial in these circumstances.

I argue in the next Section that the Court should be more forthcoming about its own sense of what guides its analysis in these “between-the-tiers” cases, and indeed in all its equal protection jurisprudence. My defense of this view will then be elaborated with specific respect to how such a candidly detailed approach might have played out with more salutary results in the *Bush v. Gore*<sup>60</sup> decision.

#### IV. IN DEFENSE OF CANDOR<sup>61</sup>

When Gerald Gunther first pleaded for more candor from the Court deploying the equal protection approach that he identified as “rationality with bite,” he quoted Justice Jackson at some length on behalf of this view. Gunther’s excerpt included the following passage:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The Framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>62</sup>

Gunther urged that when the Court does not deploy its officially strict tier of scrutiny, it routinely takes more care to scrutinize the congruence between legislative “means”—i.e., the legislative classification—and the goals asserted for the statute, so as to assure that relatively powerless groups were not being discriminated against for no better reason than that the legislators opted to help their own friends.<sup>63</sup> Admittedly, there is a certain unfortunate similarity between the judicial scrutiny recommended by Gunther and by Justice Jackson, which would guard against letting the legislature help certain favored groups, and the much frowned upon myopic scrutiny of

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<sup>60</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>61</sup> In using the term “candor,” I do not mean to imply that the majority has been engaging in purposeful deception in these outlier cases. Rather, the Court has not taken care to elaborate fully, openly, and, perhaps, introspectively, the various considerations feeding its conclusion that in the given situation the state’s policy does not measure up to the Court’s standard of “rationality” (or, as Stevens would have it, “impartiality”).

<sup>62</sup> Gunther, *supra* note 30, at 23.

<sup>63</sup> *Id.* at 37-48. I mean “friends” as a short-hand to include not only personal friends, but also those groups in the population for whom the legislators may feel extra affinity (such as those people who are not mentally retarded in Cleburne, Texas).

the *Lochner* era that produced statements like, "viewed in the light of a purely labor law . . . we think . . . that the interest of the public is not in the slightest degree affected by such an act."<sup>64</sup> During the *Lochner* era, the Court infamously showed itself all too ready to second-guess considered legislative judgments as to which groups deserved legislative assistance in situations where the legislature sincerely saw itself acting for reasons of public policy.<sup>65</sup> I take Gunther (and Justice Jackson) to be arguing not for such second guessing but simply that the Court should look closely enough to assure itself that there is indeed a *public* policy being pursued to a substantial degree by the law in question. Gunther does not favor a judicial willingness to judge the impermissibility of perceived legislative ends or motives. In its "between-the-tiers" jurisprudence, the Court has shown a willingness to scrutinize both means and ends. When its means scrutiny has revealed a lack of congruence between the asserted goals of the law and the classification drawn in the law, the Court has shown a repeated propensity to conclude that the most plausible explanation was that the law's true purpose was to express animus against an unpopular group.<sup>66</sup> Such animus is the paradigm target of the Equal Protection Clause.

On one occasion during the twenty-eight years since Justice Powell's elaborate exercise in denial in *Rodriguez*, a majority of the Justices did forthrightly break all the way through the facade of pretense that there are precisely three tiers of scrutiny: rationality, intermediate, and strict.<sup>67</sup> In *City of Cleburne*<sup>68</sup> five Justices, in one team of two with Stevens as spokesman and another team of three with Marshall as spokesman, openly debated the merits of Stevens's fluid rationality approach versus Marshall's sliding scale of scrutiny approach. The

<sup>64</sup> *Lochner v. New York*, 198 U.S. 45, 57 (1905).

<sup>65</sup> See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (arguing that this concern, more than devotion to liberty of contract, was the dominant theme of the era).

<sup>66</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); see also *supra* tbl. There is a sense in which the distant progeny of *Shapiro v. Thompson*, 394 U.S. 618 (1969), not only in the welfare context (including the recent decision *Saenz v. Roe*, 526 U.S. 489 (1999)), but also in cases involving legislative preference for in-state corporations, see *Metropolitan Life Ins. v. Ward*, 470 U.S. 869 (1985), for long-term in-state residents, see *Hooper v. Bernalillo*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982) and the ancient preference for property-holders, see *Quinn v. Millsap*, 491 U.S. 95 (1989), reflect the flip side of animus: preference for one's own. See table for fuller case descriptions.

<sup>67</sup> In the other cases listed in the table, *supra*, the Court somewhat pierced the facade. But those opinions tended to mix rationality language with heightened scrutiny language, without explaining clearly either what was going on in the case at hand or what goes on as a general matter when the Court confronts an equal protection problem. The myth of simply three tiers, with the upper two marked by the presence of a semi-suspect classification, a suspect classification, or a fundamental right is simply not tenable when the Court produces so many cases that do not fit the story.

<sup>68</sup> *Cleburne Living Ctr., Inc.*, 473 U.S. at 432.

main issue dividing the teams appeared to be Marshall's aversion to allowing the term "rationality" to be associated with his idea of a sliding scale for the rigor of scrutiny.<sup>69</sup> Both sides, however, agreed on the five essentials:<sup>70</sup> In equal protection cases the Court varies its insistence (1) on the degree of the importance of the state interest that must be furthered by the classification; (2) on the required closeness of fit between the challenged classification and the asserted goals of the legislation; and (3) on how genuine these goals need to be. The Court varies these equal protection requirements (4) in direct proportion to the degree of invidiousness of the classification (i.e., the likelihood that the classification was a product of animus or unreflective acceptance of an inappropriate stereotype); and (5) in direct proportion to the importance with respect to constitutional values of the benefit being restricted or burdened by the classification.<sup>71</sup> Both Stevens's and Marshall's opinions took the position that it is better for the Court to be candid about the flexibility of its equal protection approach than to pretend that it always asks in so-called ordinary scrutiny cases, "is there any reasonable relation between this classification and a legitimate government purpose?"

I am arguing here for judicial candor—or, in the terminology of Justice Stevens, a fuller explanation from the Court—about the Court's particularized approach to these between-the-tiers cases, and I hope that Justice Stevens will one day pen a majority opinion expressing this as the reigning constitutional doctrine.<sup>72</sup> This frank ex-

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<sup>69</sup> *Id.* at 460 (Marshall, J., concurring in part and dissenting in part). Marshall's motive here appears to have been his desire to keep the Court from second-guessing legislatures' economic policy choices, for which laws the sheer rationality test should be preserved. At least one problem with Marshall's goal is its conflict with another of his desires: to have legislative classifications based on poverty be viewed as presumptively invidious. He would no doubt maintain that the negative presumption attached only to laws *burdening* the poor, not to those benefiting them, but when politicians develop rhetoric like "freeing people from welfare dependency" and when many voters come to believe such rhetoric, then Marshall's distinction becomes difficult to maintain.

<sup>70</sup> *Id.* at 455-78 (Marshall, J., concurring in part and dissenting in part).

<sup>71</sup> The judge must ask, per Justice Stevens, whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* at 452. To judge whether a societal benefit outweighs or "transcends" a given harm is not a means-end rationality inquiry; it frankly weighs competing values, some of which have constitutional priority.

<sup>72</sup> The Court majority, in an opinion by Justice Ginsburg, took an important step in this direction in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). There, in explaining its ruling that Mississippi must waive its (more than \$2000) trial transcript fee to enable the indigent M.L.B. to appeal its termination of her parental rights, Ginsburg said that the ordinary rule that fee requirements imposed by a state need only satisfy the rationality test does not apply where the deprivation is so fundamental that the proceeding is better understood as "quasi-criminal" than in terms of its formal "civil" label. *M.L.B.*, 519 U.S. at 124. Granted, in distinguishing a level of ordinary scrutiny, where mere rationality is the test, from the more careful scrutiny in *M.L.B.*, Justice Ginsburg was not following Stevens's lead, but she did follow his lead in a number of other respects. (1) She avoided talk of one or another tier of "strict" or "intermediate" scrutiny, instead describing the Court's obligation to make a careful and contextual examination. (2) Her examination weighed the importance of the deprivation involved (total deprivation of all parental



planation of what factors the Court weighs and how it assesses the balance of these factors is precisely what Justice Stevens promoted in his *Cleburne* concurrence. Indeed, Justice Stevens would have the Court provide such an explanation across-the-board for equal protection analysis, not just after the Court has already concluded that within a given context a particular right is fundamental. Despite this qualification, *M.L.B. v. S.L.J.* may be a sign that the Court is making progress towards Stevens's goal. Such doctrinal reform promises salutary effects for the public and for commentators on the Court. A forthright statement along the lines of, "[t]his is what we did, and here is why it was proper, and here are the considerations that brought us to this decision," would go a long way toward making such decisions look less ad hoc, and would also provide useful guidance to legislators and lower court judges. A reference back to *Cleburne* by the Court that pointed out where the majority lined up in terms of doctrine would provide a legitimate foundation and clarity in precedent for such an assertion.<sup>73</sup> Most important, however, and contrary to first impression, this explanatory process might well provide discipline for the Court.

Justice Stevens's *Cleburne* opinion describes his goal for this approach simply in terms of informing the public—in his words, more detail about these various considerations would more "adequately explain the decisional process."<sup>74</sup> But Justice Marshall details additional problems that would be alleviated upon the Court's abandonment of its reticence about the flexibility of equal protection scrutiny: Besides avoiding "[leaving] lower courts . . . in the dark" (and one could add, state legislatures, too), Justice Marshall found that the lack of candor "provides no principled foundation for determining when more searching inquiry is to be invoked."<sup>75</sup> Most significantly, from the point of view of my argument, Justice Marshall noted that the judicial development of a doctrinal rule that openly acknowledges the variety of factors the Court weighs and how it weighs them could pre-

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rights—associational rights that the Court has repeatedly termed "fundamental"—against the state interest in imposing the fee—essentially revenue acquisition). (3) She described this case as, like other cases that fit into the *Griffin v. Illinois*, 351 U.S. 12 (1956), line of progeny, one that blends due process concerns with equal protection concerns (although she suggests that the equal protection element takes priority because there is not a per se due process right of appeal). *M.L.B.*, 519 U.S. at 120. Ginsburg says such cases "cannot be resolved by resort to easy slogans or pigeonhole analysis," in possible reference to such categories as "intermediate scrutiny," or "strict scrutiny." *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)). Instead, she says, "[i]n line with [past] decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." *M.L.B.*, 519 U.S. at 120-21.

<sup>73</sup> In *Baker v. Carr*, 369 U.S. 186 (1962), the Court went back and reassessed the import of the alignment of judicial votes in *Colegrove v. Green*, 328 U.S. 549 (1946), in order to produce a restatement of reigning political question doctrine. See *Baker*, 369 U.S. at 232-34. The move I am suggesting would parallel the one in *Baker*.

<sup>74</sup> *Cleburne Living Ctr., Inc.*, 473 U.S. at 451-52.

<sup>75</sup> *Id.* at 460.

vent leaving the Court "unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny."<sup>76</sup>

## V. EQUAL PROTECTION CANDOR AND *BUSH V. GORE*<sup>77</sup>

While there are numerous political scientists who question the efficacy of legal doctrine as a significant constraint on Supreme Court behavior,<sup>78</sup> it does seem plausible that, even if only as a matter of honoring the norms of their profession, Justices to some degree constrain their behavior by showing respect for precedent. Thus, it is conceivable that this particular doctrinal reform might cause Justices to pay more heed to the obligation to state forthrightly why they are imposing a given policy under the authorization of the Equal Protection Clause—simply naming a fundamental right or pointing to a given classification would not suffice.<sup>79</sup> With particular respect to the recent controversial *Bush v. Gore*<sup>80</sup> decision, such discipline might well have had a beneficial effect.

Although the per curiam opinion for the Court in *Bush v. Gore*<sup>81</sup> pointed to the presence of a fundamental right to justify its conclu-

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<sup>76</sup> *Id.*

<sup>77</sup> 531 U.S. 98 (2000).

<sup>78</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

<sup>79</sup> For instance, in the cases where the Court has declared unconstitutional racially-conscious voting district lines, drawn for the purpose of enhancing the efficacy of the vote of long-discriminated-against African-Americans, the Court majority would have to explain clearly *why* drawing such lines is invidious, rather than simply invoking the talismanic "suspect classification" to strike it down.

<sup>80</sup> 531 U.S. at 98.

<sup>81</sup> *Id.* This Essay is assuming *arguendo*, that the per curiam opinion for the Court expressed an actual majority opinion of the Court; my own view, however, is that an analysis of the various lines of reasoning in the several opinions indicates that there was no real majority. The opening sentence of the Rehnquist three, "We join the *per curiam* opinion," *Bush*, 531 U.S. at 111, appears to be a fig leaf to paper over this fact. The logic of the Rehnquist three points to the conclusion that the Florida Supreme Court had no business adopting its own policies to guide the recount and should have instead relied on the discretion of the Florida Secretary of State, Katherine Harris. *Id.* at 116. The Secretary of State favored relying on the machine recount and on those few counties that managed to do a manual recount in time for the (second) certification deadline. *Id.* at 117.

By contrast, the logic of the per curiam opinion points to the conclusion that the Florida Supreme Court was obliged to set up detailed interpretive guidelines for deciding how to measure voter intent on ballots rejected by a variety of different types of counting machines and vote-recording machines. *Id.* at 110. In the judgment of the per curiam group, since there was not adequate time—in light of the constraints of a Presidential election—for such guidelines to be developed, implemented, and then judged under appeals of the implementation, the per curiam group fell back on the certification already delivered by the Secretary of State. These two lines of argument seem to contradict each other directly.

Thus, as I read the breakdown of the actual judicial tally in *Bush v. Gore*, three Justices (Rehnquist, Scalia, and Thomas) held for the view that Article II of the Constitution invalidated the Florida Supreme Court decision. Two Justices (O'Connor and Kennedy) expressed the view that equal protection plus due process considerations demanded judicially detailed interpretive re-counting guidelines in a state-wide contest of a multi-county re-count where electoral

sions—namely, the right to cast an “undiluted vote”<sup>82</sup>—it did not specify with precision the nature of the harm to those persons it believed were being harmed, the nature of the state benefit being derived from the Florida Supreme Court policy that the United States Supreme Court’s own decision was displacing, nor the reason the majority believed the perceived harm to voters from the Florida policy outweighed the perceived benefit to the state from the policy. Had the Justices felt obliged to do so, by virtue of clear Supreme Court precedent on the subject, it is at least conceivable that the pressure to articulate these things would have produced enough re-conceptualization and re-thinking to cause a different outcome.

Consider first, the nature of the equal protection harm perceived by the per curiam group. In this instance, the right itself (to cast an undiluted vote) derived from the Equal Protection Clause, while the hypothesized *harm* to the right derived not from a classification (the equal protection kind of problem), but rather from the *absence* of such a classification. The harm was the dilution of real votes by inappropriately adding to them hypothesized, partially-marked ballots that reflected citizen decisions *not* to vote for that office.<sup>83</sup> In other

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machinery varied across counties and produced significant disparities in the accuracy of the tally. Since there was no time to implement this, and since the deadline chosen by the state legislature (with an eye toward the deadline set by federal law to assure that the state’s choice of electors be the one certified by Congress) already passed, the machine count as supplemented by a few re-counted counties would suffice as the official count. Two Justices (Breyer and Souter) took the position that, although equal protection and due process require detailed, interpretive guidelines, nonetheless, the guidelines should be left to the state supreme court to develop and to determine as a matter of state law whether the deadline preference (in terms of Congress’s statutory “safe harbor” provision) should prevail over the desire to count every ballot that clearly manifested voter intent (or at least to attempt to do so) right up until the date (weeks hence) when Congress would finally announce the outcome of the electoral college vote. Finally, two Justices (Ginsburg and Stevens) expressed the view that there was no advantage of constitutional dimensions in counting as official—as Katherine Harris’s November 26 certification had done and as the per curiam opinion’s ostensible December 12 deadline mandated—the manual recounts for two originally machine-counted counties (Broward and Volusia, using differing counting mechanisms), the hand-counted absentee ballots, and the machine recounts of the rest of the counties that had voting machines (and hand recounts of those that did not), over the state Supreme Court policy of responding to the “contest.” The state Supreme Court ordered a state-wide manual recount for all counties that had not yet done one, of all ballots that machines rejected as non-votes (“undervotes”) within the statutory standard of counting any ballot with a clearly discernible voter intent. See *Timeline*, N.Y. TIMES, Dec. 14, 2000, at A23; see also, E-mail from Michael Masinter, Professor, Nova Law School, to Leslie Friedman Goldstein, Professor, University of Delaware (January 20, 2001, 15:39:09 EDT) (on file with author). Indeed, Justices Stevens and Ginsburg appear to believe that there was not an equal protection problem at all with variegated implementation approaches to the Florida statutory standard of counting every “undercounted” ballot showing a discernible “intent of the voter,” so long as “a single impartial magistrate [would] ultimately adjudicate all objections arising from the recount process.” *Bush v. Gore*, 531 U.S. at 126 (Stevens, J., dissenting). See also *id.* at 143 (Ginsburg, J., dissenting).

<sup>82</sup> See *id.* at 105 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

<sup>83</sup> I ignore for purposes of simplification the contrary problem of failure to recount over-votes. I ignore it both because the per curiam solution, after it complained of the problem, left these votes still not reexamined, and because, as Souter and Breyer point out, there was no evi-

words, the problem here was one of due process: too much unchanneled discretion left in the hands of administrators, such that the resulting treatment might contain arbitrary disparities. The per curiam opinion ignored the in-place solution of allowing appeals to a single neutral magistrate (other than perhaps to suppose that it would not have time to operate). Thus, on these combined equal protection, due process, and fundamental right grounds, the per curiam group in effect ruled that Katherine Harris's second (November 26) certification would be the prevailing electoral count for the State of Florida.

The per curiam opinion completely neglected to examine and weigh the Florida Supreme Court's (or the implementing Leon County judge's) purpose in allowing this flexible standard for determining voter intent. Indeed, there was evidence in the record that flexible standards were needed because canvassing boards were uncovering during recounts certain kinds of ballot errors due not only to the use of differing kinds of punch styluses across precincts within a single county, but also due to differing maintenance practices for electoral machinery. That is, some precincts cleaned out old chads or replaced old machines less often than other precincts. These practices produced certain kinds of precinct-specific error patterns that canvassing boards could discover only in the counting process.<sup>84</sup> In other words, the per curiam opinion identified what it took to be the burden on a fundamental right (the threat of some degree of vote dilution), but it did not specify any purpose the state (supreme court) may have seen as the overriding public interest in justifying this burden. Had the per curiam group felt an obligation to specify these factors and weigh them one against another, their reasoning may have taken them to a different place. Even without an altered holding, the presence of a more open explanation concerning these issues, might have mitigated the level of outrage and disappointment expressed by a variety of commentators among the Court's attentive public regarding the cavalier quality of the opinion.

Most importantly, the per curiam group showed no evidence that it felt any obligation (despite the complaints in Justice Ginsburg's dissent on this point)<sup>85</sup> to delineate why the due process "remedy" that it chose was preferable to the state (supreme court) policy it displaced, in terms of due process for the fundamental right to have one's vote fully counted. The per curiam opinion effectively reinstated the vote count of the Florida Secretary of State's second certification of No-

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dence in the record that such reexamination would alter any tallies. *See id.* at 129 (Souter, J., dissenting).

<sup>84</sup> Posting of Steve Semeraro, to CONLAWPROF@listserv.ucla.edu (Dec. 15, 2000) (copy on file with author) (excerpted from Steve Semeraro, Election Case Analysis (unpublished manuscript, on file with Professor Semeraro)).

<sup>85</sup> *See Bush*, 531 U.S. at 135 (Ginsburg, J., dissenting).

vember 26, 2000. This count was based on a second machine recount statewide in the counties that had voting machines, as supplemented by hand counts of absentee ballots, hand recounts in non-machine counties, and by completed manual recounts of previously machine-recounted Volusia and Broward Counties.<sup>86</sup> Broward County and Volusia County apparently used differing counting standards for evaluating voter intent on ballots that were merely dented (or "dimpled") rather than punched to the degree that the paper tore open.<sup>87</sup> Two counties (Palm Beach and Miami-Dade) did not complete recounts by the November 26 deadline; the late Palm Beach count was not included in the certification and the Miami-Dade recount had been halted in the perception that it could not be completed by the deadline. In those counties where there had not been a manual (or a completed manual) recount of machine voting, the ones using punch machines produced vote totals as follows: The machines rejected all ballots where the chad piece of the ballot was still attached in some way if the chad happened to flip shut as the ballot passed through the machine. This system was widely reported as producing an error rate of three percent of uncounted, but nonetheless intended and otherwise proper, votes.<sup>88</sup> Manual recounting is the technique used in Florida and most other states to correct this error rate problem. Despite its assertion that the right to have a fully counted vote is constitutionally fundamental, the per curiam opinion, *without explanation*, concluded that this system combining the three percent error rate for several counties with two counties using varying techniques of ballot interpretation would be *more* true to the constitutional due process obligation to count every vote properly than would the system ordered by the Florida Supreme Court, namely to manually examine every undervote (those missed by machines as votes) and allow appeals contesting interpretation to go to the Leon County judge. It is not surprising that this absence of explanation angered most of those commentators who were not already Bush supporters.

### CONCLUSION

The Supreme Court here, to be sure, was pressed for time and under enormous political pressure, with the scrutiny of the whole world upon it. My primary goal here has not been to criticize the craftsmanship of the per curiam opinion. My goal has been rather to encourage the Court to move its equal protection doctrine in the direction outlined by Justices Marshall and Stevens in their *Rodriguez*

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<sup>86</sup> According to E-mail from Professor Michael Masinter, *supra* note 81, despite Florida law mandating a re-count in elections this close, twenty counties that use optical scanners did not do any recount for the certification.

<sup>87</sup> *Bush*, 531 U.S. at 135.

<sup>88</sup> Many Florida counties used other, much more accurate, systems of voting machinery.

(Marshall), *Craig* (Stevens), and *Cleburne* (both Marshall and Stevens) opinions. I believe that the ultimate outcome of such a move would be a tendency for Justices to hold themselves more accountable to their attentive publics by offering more fully principled and reasoned equal protection decisions. If this were to come to pass, both our constitutional law and our polity would be the better for it.